

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD DUPUIE,

Defendant-Appellant.

UNPUBLISHED

July 22, 2003

No. 232512

Wayne Circuit Court

LC No. 98-007824

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RICHARD DUPUIE,

Defendant-Appellee.

No. 240418

Wayne Circuit Court

LC No. 98-007824

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

In Docket No. 232512, defendant appeals as of right his jury trial conviction for second-degree murder, MCL 750.317, for which he was sentenced to serve a term of nine to twenty-five years' imprisonment. In Docket No. 240418, the prosecutor appeals by leave granted the trial court's order granting defendant a new trial based on an improper jury instruction. After consolidating the appeals, we affirm defendant's conviction in Docket No. 232512 and reverse the trial court order granting defendant a new trial in Docket No. 240418.

Docket No. 232512

In Docket No. 232512, defendant alleges that he was denied the effective assistance of counsel because his trial attorney did not request a jury instruction on the lesser included offense of involuntary manslaughter. We disagree.

To establish ineffective assistance of counsel, defendant must show that his trial counsel's performance fell below an objective standard of reasonableness, and that defendant

was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Here, defendant has failed to meet this burden.

Instruction on a necessarily included lesser offense is appropriate only if a rational view of the evidence would support a conviction of that offense. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); see also *People v Mendoza*, ___ Mich ___; ___ NW2d ___ (2003) (finding manslaughter to be a necessarily included lesser offense of murder). As defined by our Supreme Court in *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974):

“Involuntary manslaughter is the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.” [quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW2d 609 (1923).]

Under the aiding and abetting theory advanced by the prosecutor, an involuntary manslaughter instruction would not have been appropriate in this case because a rational view of the evidence presented at trial did not support a conviction of that offense. *Cornell, supra*.

“A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense.” *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001); see also MCL 767.39. A defendant may be convicted as an aider and abettor if: (1) the defendant or some other person committed the charged crime; (2) the defendant assisted in the commission of the crime by performing acts or offering encouragement; and (3) the defendant either intended the commission of the crime or knew that the principal had such an intent when he offered aid or encouragement. *Izarraras-Placante, supra* at 495-496. Here, the evidence offered by the defense at trial showed that defendant participated in the assault despite full knowledge that his brother had and would likely continue to violently strike the victim in the back with a tire iron.¹ Thus, the circumstances surrounding the victim's death, as presented by defendant's own witness, cannot be rationally viewed as an act perpetrated “without malice” and “not amounting to a felony nor naturally tending to cause death or great bodily harm.” *Townes, supra*. At the very least, the actions of defendant's brother constituted an assault with a dangerous weapon – a felony – perpetrated with malice. See MCL 750.82; see also *People v Rollins*, 33 Mich App 1, 10; 189 NW2d 716 (1971) (noting that a tire iron is a “potentially dangerous weapon”) and *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999) (malice, which includes an intent to do great bodily harm, may be inferred from the use of a deadly weapon). Consequently, inasmuch as the evidence in this case would not support a conviction of involuntary manslaughter, trial counsel was not ineffective in failing to request an instruction on that offense. *Cornell, supra; Toma, supra*.

¹ Defendant's brother, who testified on defendant's behalf at trial, repeatedly stated that defendant struck the victim with his fists as the victim was falling after being struck several times by defendant's brother with the tire iron. Defendant, along with another accomplice, then stepped back while defendant's brother began to again beat the victim with the tire iron as he lay on the ground.

Defendant next argues that the trial court's instructions on the causation elements of first- and second-degree murder were erroneous and, in essence, directed a verdict on those elements. However, because defense counsel expressed satisfaction with the jury instructions as read, any error in the instructions given by the trial court has been extinguished. See *People v Carter*, 462 Mich 206, 214, 219; 612 NW2d 144 (2000). Accordingly, even assuming the instructions given were erroneous, there is no error to review. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). Defendant also maintains, however, that trial counsel was ineffective for failing to object to the allegedly erroneous instructions. We disagree. This Court examines a trial court's jury instructions as a whole, and will find no error requiring reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

The trial court instructed the jury that:

The defendant is charged with the crime of First-Degree premeditated murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused the death of [the victim], that is, that [the victim] died as a result of blunt force trauma and/or a penetrating wound.

The standard jury instructions for first- and second-degree murder indicate that the court should instruct the jury that the prosecution must prove, beyond a reasonable doubt, "that the defendant caused the death of [name deceased], that is, that [name deceased] died as a result of [state alleged act causing death]." CJI2d 16.1 and CJI2d 16.5.

Under the aiding and abetting theory advanced by the prosecutor, defendant could be found guilty if the victim's death was caused by the acts of his brother. MCL 767.39. Therefore, it was not necessary for the instructions to explicitly state that the prosecution had to prove, beyond a reasonable doubt, that defendant hitting the victim with his fists caused the victim's death. Accordingly, because the instruction was not erroneous, counsel was not ineffective for failing to object to it. Defense counsel is not required to raise a meritless objection. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Lastly, defendant argues that the trial court erred by not reinstructing the jury on the elements of second-degree murder and accessory after the fact a second time. We disagree. Because defendant did not preserve this issue, we review this matter for plain error affecting the defendant's substantial rights. *People v Allen*, 466 Mich 86, 89-90; 643 NW2d 227 (2002), citing *Carines*, *supra* at 763.

The record indicates that the trial court reread the requested instructions once after the jury began deliberations. The jury requested a second rereading, but the court adjourned the trial for the day, promising to reread the instructions the following morning. The next morning the jury continued deliberations and did not indicate any further confusion about the instructions. As the prosecutor points out, if the jury had wanted additional instructions, it could have asked for them again. The trial court in no way precluded the jury from making another request. Moreover, the jury returned a unanimous verdict shortly after recommencing deliberations. Under these circumstances, we find no plain error affecting defendant's substantial rights, *Allen*,

supra, and reject defendant's additional claim that trial counsel was ineffective for failing to object to the trial court's failure to reinstruct the jury on these points, *Torres, supra*.

Docket No. 240418

In Docket No. 240418, the prosecutor appeals the trial court order granting defendant a new trial on the basis of unbalanced accomplice witness jury instructions. A trial court's decision to grant a new trial is reviewed for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). In order to determine whether the trial court abused its discretion, this Court must examine the reasons given by the trial court for granting a new trial. *Id.* This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief. *Id.*

As previously noted, defense counsel expressed his satisfaction with the jury instructions as they were read, thereby extinguishing any error in the instructions. *Carter, supra*. The trial court thus abused its discretion to the extent that it granted a new trial on the basis of an extinguished error. *Id.*; *Jones, supra*. However, because defendant also alleged that defense counsel was ineffective for failing to object to the accomplice instruction, and raised this issue at the *Ginther*² hearing, this Court may review the issue in the context of an ineffective assistance of counsel claim. *Toma, supra*.³

In this case, the trial court instructed the jury that it could "convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt," without also informing it that it could acquit on the basis of accomplice witness testimony. At the *Ginther* hearing, defense counsel admitted that he did not object to this instruction at trial because he did not see anything legally objectionable about the instruction. However, in *Cool v United States*, 409 US 100, 103 n 4; 93 S Ct 354; 34 L Ed 2d 335 (1972), the United States Supreme Court declared that instructions that inform the jury that it can convict solely on the basis of accomplice testimony without telling the jury that it may also acquit on that basis requires reversal because such instructions are "fundamentally unfair."

Defendant argues that defense counsel's failure to object to the accomplice instruction constituted ineffective assistance of counsel because the incorrect instruction was "fundamentally unfair," as set forth in *Cool, supra*. However, while we agree that counsel was deficient in failing to recognize a legal basis to challenge this erroneous instruction, we find no prejudice stemming from this deficiency under the facts of this case. *Toma, supra*.

Even had the jury been instructed that it could acquit solely on the basis of the defense witness's accomplice testimony, there is no reasonable probability that the jury would have done so. That testimony did nothing to refute the prosecutor's theory that defendant knowingly aided and abetted his brother in the victim's murder. *Id.* To the contrary, as noted above, the defense

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ The trial court granted the new trial without any reference to defendant's claim that defense counsel was ineffective for failing to object to the allegedly imbalanced accomplice witness instruction.

witness's accomplice testimony affirmatively established that defendant participated in the assault with full knowledge of his brother's malicious intent. Accordingly, even if believed, this testimony offered the jury no choice but to convict defendant of aiding and abetting in the victim's murder. Thus, defendant has failed to show any prejudice resulting from defense counsel's failing to object to the challenged instruction and a new trial is not warranted. *Id.*

We affirm defendant's conviction in Docket No. 232512 and reverse the trial court order granting defendant a new trial in Docket No. 240418.

/s/ Donald S. Owens

/s/ Richard A. Bandstra

/s/ Christopher M. Murray